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No. 91-261

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

In our *certiorari* petition we showed that this case calls for this Court's review of the closely divided *en banc* decision of the First Circuit in this case for two reasons.

First, the decision below invalidated contractual arrangements that are widely used by state and local governments in managing the development of their property. As we demonstrated, project labor agreements have been used for years by hundreds of state and local government entities seeking to protect themselves, in the same ways as do private proprietors, from the economic costs associated with construction industry labor disputes. The decision below throws the validity of this widespread contracting practice into serious question. *See* Pet. 7-14.

Second, the decision below is in sharp conflict with this Court's overall approach for determining the preemptive effect of the National Labor Relations Act ("NLRA"). The First Circuit majority assumed that state actions that concern private sector labor relations are broadly preempted by the NLRA, regardless of the state interests involved, the form of the state actions in question, or the particular ways in which the state actions affect private sector labor relations. That approach—which severely constrains the right of the States to pursue their proprietary interests in the marketplace in the same manner as would any private entity—has never been this Court's approach. *See* Pet. 14-24.

Respondents' attempt to refute these points is wholly without merit.

1. Respondents first assert that state and local governments do not in fact make wide use of the sort of project labor agreements at issue in this case. Brief in Opposition ("Br. Op.") at 5.

This unsupported assertion is in direct conflict with the published materials and survey results cited in our petition (at pp. 9-14). At least equally to the point, this unsupported assertion is in conflict with the statement of interest of the six States that have subsequently filed a brief *amici curiae* in support of the *certiorari* petition. *See* Brief *Amicus Curiae* of California, Massachusetts, Minnesota, New Jersey, Pennsylvania, Wyoming and the Commonwealth of Northern Mariana Islands in Support of Petitions for Writs of *Certiorari* (Nos. 91-261, 91-274) at 1-4. Indeed, this *amici curiae* brief specifically reports that in the State of Minnesota—which was not included in our petition's fourteen-state survey of public works projects—"dozens of recent public works projects . . . have been completed under project labor agreements." *Id.* 2-3 n.1 (listing projects).

To be sure, respondents do argue that all of the substantial evidence of the widespread use of project labor

agreements in public construction "should be stricken or disregarded" by this Court, since none of it was made a part of the evidentiary record in the district court. Br. Op. 5 & n.4 (citing *Adikes v. S.H. Kress & Co.*, 398 U.S. 144, 156 n.6 (1970) for the proposition that this Court will not rely on extra-record evidence). But the rule against use of extra-record evidence has never been applied to prohibit parties from presenting to this Court "legislative facts" regarding the broad policy implications of legal rules; the rule has been applied only to submissions regarding "the facts of the particular case as between the parties." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, 572 n.43 (6th ed. 1986).[1] Thus, the Court has frequently considered factual submissions relating to the general social importance of legal issues where the submissions advise the Court of relevant materials outside the record.[2]

Not surprisingly then, the one precedent cited by respondents, *Adikes v. S.H. Kress & Co.*, *supra*, concerned a party's effort to submit an unsworn extra-record statement by a witness whose testimony related *only* to the disputed factual issue of whether the witness had conspired with a specific police officer, an issue at the center of the

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[1] *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, *supra*, at 565 ("The general requirement that a brief stick to the record in referring to the facts of the case does not preclude the use of the so-called Brandeis brief techniques. . . . Often such legislative facts, even if not technically within the scope of judicial notice, are close to it, and the Court has not refused to consider them.")

[2] *See, e.g., Smith v. Organization of Foster Families*, 431 U.S. 816, 825 n.11 (1977) (considering submissions regarding trends in foster child placement system); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 57 (1973) (considering submissions regarding education funding patterns); *Vaca v. Sipes*, 386 U.S. 171, 192 n.15 (1967) (considering submissions regarding how collectively bargained grievance procedures are generally operated); *Regents v. Bakke*, 438 U.S. 165, 316-317, 321-24 (1978) (opinion of Powell, J.) (considering submissions regarding university admissions policies).

particular dispute between the parties. *See* 398 U.S. at 156 n.6 (refusing to consider witness' statement "denying that she had any contact with police on the day in question").[3]

Respondents also assert that the decision below will not have any wide-spread effect because there are actually two types of project labor agreements used in the public sector. Respondents contend that many such agreements only "establish certain conditions of employment without interfering in the process of collective bargaining" and therefore are legally less offensive than what respondents term the " 'union only' agreement . . . at issue in the present case, which requires actual recognition of a union and agreement to a union contract." Br. Op. 5. From beginning to end, this argument is fallacious.

a. Respondents offer *no* evidence that there are, in actual practice, two distinct types of project labor agreements, or that in the public sector, use of the supposedly "less offensive" type of agreement predominates. Indeed, the only agreement cited by respondents as an example of the supposedly "less offensive" type of agreement is the Baltimore Harbor Tunnel Thruway agreement (Joint Appendix in the First Circuit ("J.A.") at 451), which *does* require that all contractors abide by a collective bargaining agreement *and* that they recognize union representation of their employees. *See, e.g.*, J.A. 455 ("This Construction Labor Stabilization Agreement shall be applicable to all contractors performing on-site construction work"); J.A. 462-463 (requiring that all disputes be resolved through grievance and binding arbitration procedures which are to be jointly administered by the signatory unions and the contractors and which are to be conducted with union representation of employees).

[3] We would add that the contention that a petitioner is barred from relying on extra-record materials which show that a decision is of importance far beyond its impact on the parties would have a serious adverse effect on the *certiorari* practice. The rules of this Court specifically direct that petitions for *certiorari* discuss the *importance* of the question of federal law at issue. *See* Rules of the Supreme Court, Rules 10.1(c) & 14.1(j). But a legal question's "importance" is not directly relevant at the stage of proceedings when the record is being compiled: *viz.*, when a case is being adjudicated on the merits before a trial court. Thus, a petitioner will rarely be able to inform the Court of a legal question's national importance—indeed, of any aspect of the decision's importance beyond the parties—without referring to "legislative facts" that will be outside of the record of the case.

b. Moreover, respondents offer no explanation as to why a public entity's decision to require its contractors to adhere to a supposedly "less offensive" project labor agreement—which is still a collectively bargained agreement that "establish[es] certain conditions of employment" (Br. Op. 5) for all project work—would be lawful under the First Circuit's approach. While we are not certain in this regard—given the vagueness of respondents' description of such agreements—it would appear that the First Circuit majority would invalidate any project agreement that binds non-union employers to collectively-bargained terms of employment for all their project employees as an improper "interference in the collective bargaining process" (Br. Op. 5).

The effort by respondents to hypothesize a kind of project labor agreement that would be less offensive *to them*, without any demonstration that the agreement would be less offensive to the law as stated by the First Circuit majority, is of no relevance to an assessment of the importance of this case.

2. With respect to the merits of the majority decision below, respondents assert at the outset the fundamental premise on which their position—and the First Circuit's decision upholding their position—must rest: *viz.*, that, under the NLRA respondents have a *"right to negotiate their own terms of employment or to operate on a non-union basis* . . . on th[e] government project" at issue in

this case—free from any "interference" by the governmental body that is developing its property through the construction project in question. Br. Op. 4 (emphasis added). And respondents argue, in essence, that the project-wide labor agreement at issue here "forced the [respondents] and other contractors . . . to abandon their [NLRA] right" to determine their own labor relations policies. *Id.*

At no point, however, do the respondents identify the NLRA source for this broad "right" of contractors to act without regard for the interests of those who purchase their services. Nor do respondents state any reason to believe that Congress intended to disable state and local government purchasers of construction services—alone among all purchasers of such services—from securing the benefits in labor peace provided by lawful project labor agreements.

The reason respondents have not done so is that, as we demonstrated in our *certiorari* petition theri is *no* specific statutory language stating any such "right" of contractors, nor is there the slightest evidence in the NLRA's structure or history that Congress intended to render state and local governments—and only state and local governments—economically defenseless in their proprietary dealings with their own construction contractors.

Thus, aside from bluster, respondents' position on the merits comes down to the argument that recent NLRA decisions of this Court—none of which involved actions in the marketplace by state and local governments acting in their proprietary capacity—"are directly on point and . . . properly dictated the outcome below." Br. Op. 8.

According to respondents, *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986) (*"Golden State I"*); *Golden State Transit Corp. v. Los Angeles*, —— U.S. ——, 58 L.W. 4303 (1989) (*"Golden State II"*); and *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 272 (1986), stand for the broad proposition that the States can *never* "interfere" with private sector collective bar-

gaining. Br. Op. 8-14. Respondents could not be more wrong.[4]

a. Respondents—like the court of appeals majority below—cite this Court's *Golden State* cases as broadly prohibiting all "direct local government interference with the process of collective bargaining." Br. Op. 8. But the *Golden State* cases involved *state police-power regulation of the labor relations of private parties doing business with the general public* and thus were in the main stream of this Court's labor preemption cases. The *Golden State* cases did *not* raise—and this Court did *not* decide—any question concerning the rights of a State acting in the marketplace in its proprietary capacity and seeking to protect only its proprietary interests in the same manner as would a private proprietor.

While our analysis of *Golden State* in the *certiorari* petition (at 22-23) fully refutes the respondents' argument, it is worth repeating the most basic point that respondents ignore; *viz.*, that the *Golden State* Court did not state the broad rule of preemption urged by respondents, but rather stated *only* that the NLRA prohibits States from entering "into the substantive aspects of the bargaining process *to an extent Congress has not countenanced.*" *Golden State I*, 475 U.S. at 616 (emphasis added) (*quoting Machinists v. Wisconsin Emp. Rel. Comm.*, 427 U.S. 132, 149 (1976)). And, respondents, in their discussion of these cases, have never explained what evidence there is that "Congress has not countenanced" purely proprietary conduct by the States that is in *"scope, purport, and impact"* identical to the commonplace proprietary conduct of similarly-situated private property owners, *which conduct Congress has counte-*

[4] Respondents largely ignore *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957), a decision upon which the First Circuit majority placed considerable reliance. *See* Pet. App. 10a-12a, 24a. As we explained in our *certiorari* petition—and as respondents now appear to accept—the court below erred in relying on *Guss*. *See* Pet. 20-21.

nanced. See New York Telephone Co. v. New York Dept. of Labor, 440 U.S. 519, 532 (1970) (drawing implications of congressional intent with respect to NLRA preemption requires examination of the "scope, purport, and impact of the state program" against the background of federal labor policy).

b. Respondents eventually fall back on this Court's decision in *Wisconsin Dept. of Industry v. Gould, supra*, a case involving a State's contracting practices. According to respondents, Gould makes clear that it is irrelevant for purposes of NLRA preemption analysis that the State's interests and conduct are "proprietary"—as distinct from "regulatory"—and indistinguishable in form and purpose from lawful private conduct. Br. Opp. 11-13. Once again, respondents fundamentally mischaracterize this Court's decision.

The question before this Court in *Gould* was whether the NLRA preempted a Wisconsin statute that barred any employer who had in any way violated the NLRA three times in a 5-year period from doing any business with the State. The *Gould* Court held that the state law conflicted with Congress' decision that the remedies administered by the NLRB be the exclusive remedies for NLRA violations. 475 U.S. at 286-287.

In reaching its conclusion, however, the Court did *not* —as respondents would have it—broadly declare that the proprietary nature of a government action is never relevant to the issue of preemption; rather, the Court rested its decision on the conclusion that Wisconsin was *in fact* acting to further regulatory concerns relating to private sector labor policy and *not* its legitimate proprietary concerns.

Because Wisconsin's inflexible debarment rule addressed employer conduct *unrelated* to the employer's performance of any contractual obligations *to the State*, the state law's purpose was, in this Court's view, to achieve substantive regulatory policy goals regarding labor relations generally, rather than to protect state procurement interests at issue in its contract relationships. On this basis, the Court determined that Wisconsin "simply [was] *not* functioning as a private purchaser of services," and the Court concluded that the State's "debarment scheme [was] *tantamount to regulation*." 475 U.S. at 289 (emphasis added). Indeed, the *Gould* Court went out of its way to make clear that it was "not say[ing] that state purchasing decisions may never be influenced by labor considerations," 475 U.S. at 291, and the Court emphasized that it was "not faced [in *Gould*] with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs," *id.*[5]

Had the *Gould* Court wished to adopt the broad preemption rule that respondents urge here, none of this extensive discussion of the State's interests would have been necessary. Under the First Circuit's (and the respondents') erroneous view of the law, after all, the nature of the State's interests—and, indeed, the fact that the State is acting as a proprietor in the marketplace—are entirely irrelevant.

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[5] The *Gould* Court explained its reasoning in this regard in some detail:

> The State concedes, as we think it must, that the point of the statute is to deter labor law violations and to reward "fidelity to the law." No other purpose could credibily be ascribed, given the rigid and undiscriminating manner in which the statute operates. . . . Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the [National Labor Relations] Board's comprehensive regulation of industrial relations in preciseely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State. [475 U.S. at 288.]

CONCLUSION

For the reasons stated in our *certiorari* petition and in this reply brief, the petition should be granted.

Respectfully submitted,

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